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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5B**

**BRITISH VIRGIN ISLANDS (BVI)**

This is the **summative (formal) assessment** for **Module 5B** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

**The mark awarded for this assessment will determine your final mark for Module 5B**. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

**INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial or Avenir Next font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment5B]**. An example would be something along the following lines: 202223-336.assessment5B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6.The final submission date for this assessment is **31 July 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

**ANSWER ALL THE QUESTIONS**

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

**Question 1.1**

For the purposes of a **qualifying resolution** for an insolvent liquidation to **appoint a liquidator** under section 159 the Insolvency Act 2003 by the company’s members, what is the required majority of those who are present and entitled to vote?

1. 50%.
2. 75%.
3. 100%.
4. 90%.

**Question 1.2**

In order to comply with section 156 of the Insolvency Act 2003, **what timeframe** for payment of the debt (or to secure or compound for the debt), must a statutory demand require?

1. Within 14 days of the service of the statutory demand.
2. Within 21 days of the date of the statutory demand.
3. Within 21 days of the service of the statutory demand.

1. Within 14 days of the date of the statutory demand.

**Question 1.3**

Which of the following **is not able** to make an application for the removal of a liquidator?

1. A member of the company.
2. A creditor.
3. The creditors’ committee.
4. A receiver.

**Question 1.4**

Where a receiver exercises a power of sale, the receiver owes a duty to obtain the best price reasonably obtainable at the time of sale. **To which one of the following is the duty owed to**?

1. The creditors, the shareholders, persons claiming an interest in the assets and the company.
2. The creditors, sureties, the shareholders and the company.
3. The creditors, sureties, persons claiming an interest in the assets of the company and the company.
4. The creditors, shareholders, sureties and persons claiming an interest in the assets of the company.

**Question 1.5**

Who cannot apply for a provisional liquidator to be appointed in a company?

1. The Attorney General.
2. The company.
3. A creditor.
4. A secured creditor.

**Question 1.6**

Under the Reciprocal Enforcement of Judgments Act 1922, what is the **time period** during which a foreign judgment is registrable in the BVI?

1. Within 12 months of the date of judgment.
2. Within three (3) months of the date of trial.
3. Within six (6) months of the date of judgment.
4. Within six (6) months of the date of trial.

**Question 1.7**

Which one of the below **is not** an effect of the appointment of a liquidator over a company?

1. The assets automatically vest in the liquidator.
2. No amendment allowed to the memorandum or articles of association of the company.
3. Shares in the company can be transferred.
4. No action can commence or proceed against the company unless ordered by the Court.

**Question 1.8**

In a liquidation, what is the **vulnerability period** for an undervalue transaction in the case of a transaction entered into with a connected person?

1. Two (2) years prior to the onset of insolvency and ending on the appointment of the liquidator.
2. Two (2) years prior to the appointment of the liquidator.
3. Six (6) months prior to the onset of insolvency and ending on the appointment of the liquidator.
4. Five (5) years prior to the appointment of the liquidator.

**Question 1.9**

Which of the following **is not** a resolution that the directors of a company must pass in order to put in place a company creditors’ arrangement?

1. Stating that the company is insolvent or is likely to become insolvent.
2. Approving a written proposal setting out how the creditors’ rights will be varied or cancelled.
3. Approving a liquidation plan and a declaration of solvency.
4. Nominating an eligible insolvency practitioner to be appointed interim supervisor.

**Question 1.10**

What is required to place a company into voluntary liquidation?

1. Directors’ resolution to appoint a voluntary liquidator. [Can be member’s resolution]
2. A liquidation plan approved by the directors and a resolution passed by shareholders approving the liquidation plan. [Doesn’t need to be approved by shareholders]
3. Declaration of Solvency.
4. All of the above.

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 2 marks]**

When is an eligible licensed insolvency practitioner required to be appointed under the Insolvency Act 2003, and what is meant by “eligible”?

‘Eligible’ refers to him/her being a licenced insolvency practitioner; having given written consent to act in the prescribed form; not being disqualified from holding a licence under s. 477, not being disqualified from action. There needs to be in force such security for the proper performance of his functions.

**Question 2.2 [maximum 2 marks]**

In what circumstances can a statutory demand be issued under the Insolvency Act 2003, and by whom?

Per s. 290 of the Act and rule 149(1) of the Insolvency Rules, the minimum amount of debt for which a SD may be issued under s. 155 is USD 2,000. It may be issued by a creditor owed a debt due and payable by the SD-recipient company.

**Question 2.3 [maximum 2 marks]**

Under the BVI Business Companies Act 2004, when is a company required to have a registered agent and when is one not required?

Every company incorporated or partnership in the BVI is required to have a registered agent at all time unless in insolvent liquidation.

**Question 2.4 [maximum 4 marks]**

When can the Court appoint a liquidator under the Insolvency Act 2003? And who can make an application for such an appointment?

Where the Court is satisfied that the company is insolvent, it would be just and equitable to do so, or in the public interest. This is pursuant to an application under s. 162 / s. 163 if the Act, on application by the company, a creditor, a member, the supervisor of a creditor’s arrangement, the FSC, or the AG.

If the voluntary liquidator is not a licenced (eligible) insolvency practitioner, the OR may apply to the Court for the appointment of himself or another licenced insolvency practitioner. The Court must be satisfied that the company is insolvent.

**QUESTION 3 (essay-type questions) [15 marks in total]**

**Question 3.1 [maximum 5 marks]**

With reference to the relevant legislation, what are the requirements to be appointed as a voluntary liquidator in the BVI after 1 January 2023?

1. Directors’ resolution or members’ resolution, in accordance with s. 199(2)-(4) BCA
2. Must be ‘eligible individual’, i.e. cannot be disqualified from acting or being appointed as voluntary liquidator (reg. 19(2) of the BCA Regulations sets out a list of individuals so disqualified)
3. Per s. 199 of the BVI Business Companies (Amendment) Act 2022 and regulation 6(a)1A of the BVI Business Companies (Amendment) Regulations 2022: has liquidation experience of not less than 2 years; has professional competence to liquidate the specific company concerned; is able to demonstrate that he holds an insolvency practitioner’s licence or has an appropriate professional qualification (e.g. law, accountancy) and experience of providing legal and financial advice or support to companies in the financial services sector; and is fully conversant with relevant financial services legislation connected to the business of the company to be liquidated, including the FSCA and the BCA.

**Question 3.2 [maximum 5 marks]**

What can be included in an order granted by the Court following a request by a foreign representative to aid in a foreign proceeding under section 467 of the Insolvency Act 2003?

1. Restraining the commencement or continuation of anyu proceedings against a debtor/his property
2. Restraining the creation, exercise or enforcement of any right or remedy over or against any of the debtor’s property
3. Requiring any person to delivery up any property of the debtor or proceeds thereof
4. Ordering or granting relief to facilitate, approve, or implement arrangements that will result in a coordination of BVI insolvency proceeding with a foreign proceeding
5. Appointing an interim receiver of any property of the debtor
6. Authorising examination by the foreign representative of the debtor or any person who could be examined in a BVI insolvency proceeding
7. Staying, terminating, or making any order the court considers appropriate in relation to a BVI insolvency proceeding

**Question 3.3 [maximum 5 marks]**

What is a scheme of arrangement under the Insolvency Act 2003? When can such an application be made to the Court, by whom and what are the requisites for it to be approved?

This is a statutory mechanism that permits a company to enter into a compromise or arrangement between the company and its creditors, or its shareholders. In certain circumstances it allows a company to restructure and avoid entering into a formal insolvency process. It is binding on all creditors, shareholders, and the company once the order approved by Court sanctioning it is filed with the Registrar.

There is no need for the company to be insolvency when the application is made to court. The scheme can be initiated by the company, creditor, shareholder, or liquidator (voluntary or appointed under the IA) by applying to court for a meeting or creditors or shareholders.

The requisites are 75% in value of the creditors or class of creditors or shareholders or class of shareholders present and voting at the meeting. The applicants must then return to court for approval of the scheme.

**QUESTION 4 (fact-based application-type question) [15 marks in total]**

**Question 4.1 [maximum 6 marks]**

In 2019 Yellow Limited, a company incorporated in the BVI entered into a 10-year mortgage with Orange Mortgages Limited, a company registered in the UK, for a property situated in the BVI, which mortgage was due to be paid monthly. Under the terms of the mortgage, if Yellow Limited defaulted on one payment, then the mortgage was repayable immediately. Yellow Limited is now four months in arrears on the mortgage.

Providing reasons, with particular reference to the Insolvency Act 2003, answer the following question:

1. What are the options open to Orange Mortgages Limited in respect of any redress against Yellow Limited?
2. What would be the options available to Orange Mortgages if the loan was unsecured?

Orange Mortgages (OM) may wish to issue a statutory demand under s. 155 of the IA to Yellow Limited, assuming that the amount owed is in excess of USD 2,000. OM may wish to make an application under s. 296(1) of the IA for the court to make an insolvency order or interim order. In the interim while the application has not been determined by the court, OM may also seek interim relief such as for an eligible insolvency practitioner to take control of Yellow Limited’s assets or part thereof and any relevant books and documents.

Assuming Yellow Limited is wound up, the unsecured creditor needs to make a written claim to the liquidator with sufficient particulars. Subsequently, it may opt to establish or participate in a creditors’ committee, or enter into set-off and netting arrangements.

**Question 4.2 [maximum 9 marks]**

In 2023 Owed Limited, a company registered in England, was awarded a judgment for an unsecured debt in the English High Court against Indebted Limited, also incorporated in England, of GBP 10 million. In an attempt to enforce its judgment, Owed Limited has discovered that Indebted Limited’s only asset is a 100% owned subsidiary, Subco Limited, a company incorporated in the BVI, which itself owns a number of unencumbered properties in the BVI but has been struck off of the Register and is now dissolved. The sole shareholder and sole director of Indebted Limited has recently passed away.

You have been tasked by your principal to prepare a memorandum to advise Owed Limited to assist it in recovering the judgement debt by detailing:

1. the number of obstacles Owed Limited has to overcome first before any recovery is possible; and
2. its options to recover the judgment debt owed by Indebted Limited.

First step would be registration of the foreign judgment. The judgment is registrable as England is a jurisdiction to which the 1922 Act extends. As it is not clear when in 2023 the judgment was handed down, time is of the essence with respect to the application for registration, as the judgment is only registrable within 12 months of the date thereof, unless the BVI court grants a longer period on the basis that doing so would be just and convenient.

The application for registration includes application by Owed Ltd to the BVI court under CPR Part 72. This must contain prescribed information and exhibit a duly authenticated copy of the judgment and details of any interest which has become due under English law. The application can be made without notice to the judgment debtor. Once a foreign judgment is fully registered, it is treated as being of the same force and effect as if that judgment had been made in the BVI. This would enable Owed Ltd to enforce the judgment against Indebted Ltd’s assets in BVI, including the former’s wholly owned subsidiary and its assets.

Some obstacles include:

* the judgment creditor may have to give security for costs in relation to any proceedings that can be brought to set aside the registration
* the court may not order the registration of the judgment in certain circumstances which the creditor has to prove are not present, e.g. that the English court acted without jurisdiction, the debtor was not a person who carried on business or was ordinarily resident in England and did not appear or submit to English jurisdiction – this may be a problem if the sole shareholder/director of Indebted Ltd passed away before the judgment was delivered and/or did not participate in the English proceedings
* since Subco Ltd has been struck off and dissolved, there may be a need for Owed Ltd as a person with an interest in having the company restored, to take steps to restore it under ss. 217, 218 of the BCA
* it is not clear when Subco was struck off and dissolved, and restoration is only possible for 5 years from the point of dissolution
* Owed may also have to contend with other creditors of Indebted / Subco, as it has an unsecured debt

**\* End of Assessment \***